



FEDERAL ELECTION COMMISSION

WASHINGTON, D C 20463

JUL 8 2005

VIA FIRST CLASS MAIL

Bruce I. Afran, Esq.
10 Braeburn Drive
Princeton, NJ 08540

RE: MURs 5489, 5513, 5533 and 5581
Nader for President 2004 and
Carl M. Mayer, in his official capacity as
treasurer

Dear Mr. Afran:

On September 20, 2004, the Federal Election Commission notified your clients, Nader for President 2004, and Carl M. Mayer, in his official capacity as treasurer (the "Committee), of complaints alleging certain violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). Copies of the complaints were forwarded to you at that time.

On June 23, 2004, the Commission severed the allegations in MUR 5581 that relate to activity in Oregon and placed them in MUR 5489, and similarly severed the allegations that relate to New Hampshire and placed them in MUR 5513 and severed the allegations that relate to activity in Michigan and placed them in MUR 5533. The allegations in MUR 5581 that relate to activity in Arizona remain in that MUR.

Upon further review of the allegations that relate to activity in Arizona contained in the complaint in MUR 5581, and information supplied by you, the Commission, on June 23, 2005, found that there is reason to believe the Committee violated 2 U.S.C. §§ 441a(f) and 441b, provisions of the Act. The Factual and Legal Analysis which formed a basis for the Commission's finding, is attached for your information. We will address the status of MURs 5489, 5513, and 5533 in separate correspondence to you.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred

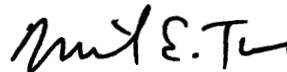
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Beth Mizuno, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Michael E. Toner
Vice Chairman

Enclosures
Factual and Legal Analysis
Procedures

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Nader for President 2004 and Carl M. Meyer, **MUR:** 5581
in his official capacity as treasurer

I. INTRODUCTION

This matter was generated by a complaint filed against Nader for President 2004 and Carl M. Meyer, in his official capacity as treasurer ("Nader Committee" or "Committee") by Daniel Schneider.¹ The complaint alleges that the Nader Committee accepted prohibited corporate contributions and/or contributions in excess of the statutory limit in connection with efforts to gather petition signatures to ensure Ralph Nader's appearance on the Arizona ballot during the 2004 Presidential election cycle. 2 U.S.C. §§ 441a(f), 441b(a).

II. FACTUAL AND LEGAL ANALYSIS

A. FACTS

Complainant in MUR 5581 asserts that the Arizona Republican Party ("ARP") made excessive and unreported contributions to the Nader Committee in connection with a petition drive to place Ralph Nader on the Arizona ballot during the 2004 Presidential election. The bases of this allegation are: (1) state Republican parties across the country were involved in similar activities; (2) forty-six percent of Arizona voters who signed Nader petitions were Republicans; and (3) individuals associated with ARP were linked to Nader petition-gathering efforts. Complaint at 13-14, ¶¶46-50. The allegations in the complaint specifically focus on the

¹ The complaint in MUR 5581 makes allegations regarding the Nader Committee with respect to activity in four states (Arizona, Oregon, New Hampshire, and Michigan). Allegations regarding the Committee's activities in Arizona remain in MUR 5581. Allegations regarding Oregon have been consolidated in MUR 5489, allegations regarding New Hampshire have been consolidated in MUR 5513, and allegations regarding Michigan have been consolidated in MUR 5533.

third category, pointing to press reports that Nathan Sproul, a former Executive Director of ARP, provided funding for signature gathering efforts in Arizona.² Moreover, complainant points to additional press reports that Steve Wark, a Nevada-based Republican consultant, formed an organization to raise money to get Nader on the ballot in Arizona.³ Complainant further alleges that the Nader Committee accepted in-kind contributions in the form of signatures.

Complainant alleges that Nathan Sproul ("Sproul") was "a major source of funding to put Ralph Nader on Arizona's presidential election ballot," and that Sproul was the "'primary source of the money' for paying for petition circulars to place Nader on the ballot." Complaint at 13-14, ¶49 (citing a June 8, 2004 article in the Arizona Republic). Nathan Sproul is the owner of Sproul & Associates, Inc., an Arizona-based political consulting firm. Various sources linked Sproul to efforts to aid the Republican Party by placing Nader on the Arizona ballot. Jon Kamman, *GOP Aids Nader, Dem Says*, The Arizona Republic, June 8, 2004; Max Blumenthal, *Nader's Dubious Raiders*, American Prospect Online, June 25, 2004.

Press reports describe the overlap between the Nader Committee's petition-gathering efforts and Sproul's. According to an article that appeared in the American Prospect, the Nader Committee hired JSM, Inc. ("JSM"), a Florida-based petition contractor, to collect signatures to put Nader on the Arizona ballot. Blumenthal, *supra*. Simultaneously, the article alleges, Sproul & Associates was collecting signatures for an Arizona ballot measure effort, No Taxpayer Money for Politicians, and that "two of the contractors Sproul hired to oversee the petition-gathering for No Taxpayer Money for Politicians . . . were also paid by Sproul to get as many

² John Kamman, *GOP Aids Nader, Dem Says; Accused Official Denies Paying for Signature Drive*, The Arizona Republic, June 8, 2004.

³ William March, *One Third of Nader Donors Support GOP*, The Tampa Tribune, July 15, 2004.

signatures as possible for Nader.” *Id.* The article goes on to state that Sproul delivered the petitions gathered by his employees to Jenny Breslyn, the owner of JSM—the firm the Nader Committee hired—and that “Breslyn mixed them in with her own [petitions].” *Id.*

The complaint also alleges that Steve Wark, a Republican political consultant, was “undertaking efforts on behalf of Nader to put him on the Arizona ballot.” Complaint at 14, ¶50(a)-(b). According to a report in the Tampa Tribune:

In Arizona, GOP consultant Steve Wark formed a political committee to raise money to help Nader qualify. A Republican activist working with the committee asked supporters to “join me in this gallant effort to give our President the best chance possible of winning,” and when Wark was asked whether he thought it would help Bush, he told The Associated Press: “I would hope so, I didn’t do it for my own health.”

March, *supra* n.2.

Various articles recount Wark’s “I didn’t do it for my health” statement in the context of his efforts to get Nader on the Nevada ballot.⁴ Thus, the Tampa Tribune article quoted above may have conflated Arizona with Nevada.⁵ Regardless, according to one newspaper, Wark “told the paper he raised \$30,000 to pay for the Nader signatures,” and that “the money he raised went to a nonprofit group called Choices for America, which then passed it on to JSM.” Editorial, *Nader Paid Raiders Overstep*, Charleston Gazette, July 20, 2004.

⁴ See e.g. Erin Neff, *Wark Raised Money for Petition Drive*, Las Vegas Review Journal, July 12, 2004; see also, *Republican Behind Nader’s Nevada Ballot Drive*, Fox News Channel, http://www.foxnews.com/printer_friendly_story/0,3566,125423,00.html (last accessed November 18, 2004), and David W. Jones, *Continued Bush Assistance to Nader’s Struggling Campaign*, TheNaderFactor.com, <http://www.thenaderfactor.com/press/072304/> (last accessed November 18, 2004). In an electronic mail solicitation, Wark reportedly asked that money to support his signature gathering efforts be sent to his home in Las Vegas. Neff, *supra*. Publicly available records confirm that Mr. Wark maintains a residence in Nevada; they show no person with his name with a residence in Arizona.

⁵ Wark is the former executive director of the Nevada Republican Party. Editorial, *Nader Paid Raiders Overstep*, Charleston Gazette, July 20, 2004.

The Nader Committee contends that it “has no knowledge of these activities except as reported in the news media.” Nader Committee Response at 3. Indeed, none of the available information indicates that Nader Committee officials knew of the alleged petition-gathering activities. Yet regardless of the Nader Committee officials’ actual knowledge, if JSM can be considered the Committee’s agent, then JSM’s knowledge of the activities would be imputed to the Nader Committee.

B. ANALYSIS

The Act prohibits corporations from making contributions or expenditures in connection with federal elections and prohibits any officer or director of any corporation from consenting to any contribution or expenditure by the corporation. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(e).⁶ An in-kind contribution is “anything of value,” including the provision of goods or services without charge. 2 U.S.C. § 431(8)(A)(i); *see also* 11 C.F.R. § 100.52(d)(1).

Commission regulations provide that “any person who has actual authority . . . to solicit, receive, direct, transfer, or spend funds in connection with any election” is an agent of a Federal candidate. 11 C.F.R. § 300.2(b)(3).⁷ During the 2004 Presidential election cycle, the Nader Committee paid JSM \$164,490 for “Ballot Access.” As the Nader Committee’s petition-gathering vendor, JSM certainly had the authority to spend funds in carrying out the tasks the

⁶ Amounts spent on promoting a candidate for the general election ballot “by seeking signatures on nominating petitions” are expenditures. Advisory Opinion 1994-5 (White) (“[E]xpenditures to influence your election would include amounts you spend . . . to promote yourself for the general election ballot by seeking signatures on nominating petitions”).

⁷ We analyze the Nader Committee’s liability as liability under a theory of actual authority, not apparent authority. The grant of authority in this instance is from the Nader Committee to JSM. It is thus a grant of actual authority. It does not involve representations by the Nader Committee to a third party that causes the third party to believe that the principal consents to have acts done on its behalf by the person purporting to act for it. Thus, it does not involve a grant of apparent authority. *See* Restatement (Second) of Agency §§ 7 and 8 (1958).

committee hired it to perform and was therefore the Nader Committee's agent. However, as the Commission explained in the Explanation and Justification of 11 C.F.R. § 300.2(b):

It is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal . . . liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal.

Explanation and Justification for Final Rules on "Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money," 67 Fed. Reg. 49064, 49083 (July 29, 2002).

Under general principles of agency law, an agent is authorized to do "what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts." Restatement (Second) of Agency § 33 (1958). In other words, a principal is liable for the acts of its agents committed within the scope of his or her employment. *Weeks v. United States*, 245 U.S. 618, 623 (1918); see also Restatement (Second) of Agency § 228(1);⁸ *Rouse Woodstock Inc. v. Surety Federal Savings & Loan Ass'n*, 630 F. Supp. 1004, 1010-11 (N.D. Ill. 1986) (principal who places agent in position of authority normally must accept the consequences when the agent abuses that authority).

In the past, the Commission has applied these general agency principles to political committees and held them liable for the acts of their agents. In MUR 4919 (Charles Ball for Congress), the Commission imputed liability to the Charles Ball for Congress committee for fraudulent misrepresentation where the committee's campaign manager, Adrian Plesha, covertly

⁸ An agent's conduct is within the scope of his authority if it is the kind he is employed to perform, takes place within authorized time and space limits and is actuated, at least in part, by a purpose to serve the principal. Restatement (Second) of Agency § 228 (1).

arranged and financed a mailing and a phone bank under the guise of the opposing state political party in order to suppress votes for Charles Ball's opponent. *See also* A.O. 1992-29 (Holtzman) (committee liable for acts of employee who acted without treasurer's knowledge and in conflict with express instructions).⁹

The Nader Committee retained JSM to gather petition signatures to place Nader on the Arizona ballot. Press reports indicate that JSM may have accepted prohibited in-kind corporate contributions in the form of petitions and, possibly, excessive cash contributions. While "authority to do illegal or tortious acts . . . is not readily inferred," if an agent "has reason to infer his principal's consent," the principal may be held accountable for the agent's illegal acts. Restatement (Second) of Agency § 34, cmt. g; *see also* Restatement (Second) of Agency § 31, cmt. a. ("if a servant is directed to use any lawful means to overcome competition, the bribery of employees of the competitor, or the circulation of malicious stories, might be found to be within the scope of employment"). Even if the agent's conduct is illegal, it is a "well-settled general rule . . . that a principal is liable civilly for the tortious acts of his agent which are done within the course and scope of the agent's employment." 3 Am. Jur. 2d Agency § 280 at 782; *see also* MUR 4919, *supra*, p.4 (finding probable cause to believe campaign committee, acting through its campaign manager, knowingly and willfully violated the Act by misrepresenting itself as a party committee); *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1395 (D.C.

⁹ While the Commission most often considers an agency theory where the agent in question is a committee employee, a non-employee vendor may also be an agent. *See* AO 1989-21 (Abramson) (concluding that artist designing merchandise referencing Federal candidates, communicating directly with customers, but forwarding percentage of profits to candidate committee would be an authorized fundraising agent of the committee); AO 1990-1 (DCC) (provider of 900 phone line service to candidate committees, "as a participant in the solicitation of contributions," is an agent); *see also U.S. v. Thomas*, 377 F.3d 232, 238 (2d Cir. 2004) (citing Restatement (Second) of Agency § 14N for the proposition that "an independent contractor may also be an agent").

Cir. 1984), *cert. denied*, 469 U.S. 1072 (holding union liable for scheme in which officer of union conspired with employer to procure illegal kickbacks).

Accordingly, given the relationship between the Nader Committee and JSM, there is reason to believe that Nader for President 2004 and Carl M. Meyer, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b(a) by knowingly accepting excessive and/or prohibited contributions.

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